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Good Violation / Post and Walk

- **Eleventh Circuit holds that the "post and walk" policy is unconstitutional under *James Daniel Good*.**

In April 1993, the Government filed a forfeiture complaint against the property and obtained from the clerk a warrant of arrest *in rem* pursuant to Rule C(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims. A *lis pendens* was recorded that same day. The warrant of arrest *in rem* was executed by posting a copy on the property, as authorized by Supplemental Rule E(4)(b). The Government did not physically intrude or otherwise interfere with the occupants' use and enjoyment of the property during the pendency of the forfeiture action. Following the Supreme Court's decision in *United States v. James Daniel Good Real Property*, 510 U.S. 43, in December 1993, the claimant filed a motion to dismiss arguing that the Government's failure to provide him with "pre-posting" notice and opportunity for a hearing deprived him of due process. The district court denied this motion and later entered summary judgment for the Government. The claimant appealed, challenging, *inter alia,* denial of his motion to dismiss. An unanimous panel of the **Eleventh Circuit** reversed.

The panel rejected the Government's efforts to distinguish *United States v. 2751 Peyton Woods Trail, S.W.*, 66 F.3d 1164 (11th Cir. 1995), on grounds that the seizure in this case involved no physical intrusion on the property whereas in *Peyton Woods* the marshal had changed the locks on an uninhabited dwelling. The panel instead defined the issue as whether due process requires notice and opportunity for a hearing before what it termed a "nonphysical seizure" may be executed. The panel proceeded to apply the three-factor standard of *Matthews v. Eldridge,* 424 U.S. 319 (1976), a case relied upon in *Good*.

As to the first factor (the significance of the private interests at stake), the panel found that merely posting a warrant of arrest *in rem* gives the Government "important rights of ownership," including the "potential for physical intrusion," the right to prohibit sale, to evict occupants, to modify the property, to condition occupancy, etc. Hence, it concluded that "even a nonphysical seizure impairs the historically significant right to maintain control of one's home free from governmental interference."

As to the second factor (the risk of error), the panel simply noted that *Good* had held that *ex parte* procedures create an unacceptable risk of error.

Turning to the third factor (the governmental interest in nonphysical, *ex parte* seizures), the panel noted that the Supreme Court in *Good* had held that

it is not necessary to "seize" real property for purposes of securing *in rem* jurisdiction. It focused on the isolated statement in *Good* that real property "may be brought within the reach of the court simply by posting notice on the property and leaving a copy of the process with the occupant." *Good*, 510 U.S. at 58. Based thereon, the panel concluded that the Government may simply post a "notice" on the property, file its forfeiture complaint, proceed to trial, obtain a judgment of forfeiture, and only thereafter "seize" the property. Hence, it found that the Government had no strong interest in posting warrants of arrest *in rem*.

The panel held that the mere fact that the Rules may authorize issuance of such warrants upon the filing of forfeiture complaint does not mean that due process permits execution of the warrant without affording the owner prior notice and opportunity for a hearing. It held that the Government must refrain from executing such a warrant until after it has provided notice and a hearing. Since the Government did not allege an "exigent circumstances" justification for the *ex parte* "seizure," the panel ordered the forfeiture action dismissed without prejudice. —*HSH*

United States v. 408 Peyton Road, S.W., ___ F.3d ___, 1997 WL 212209 (11th Cir. May 15, 1997). Contact: AUSA Al Kemp, Jr., AGAN01(akemp).

Comment: The Asset Forfeiture and Money Laundering Section is recommending that a petition for hearing with suggestion for rehearing *en banc* be filed in this case. The decision simply disregards the requirements of the Supplemental Rules specifically approved by the Supreme Court in *Good* as the basis for its "post and walk" alternative. Although the majority in *Good* did, in fact, make the statement relied upon by the panel in *Peyton Road* that "real property may be brought within the reach of the court simply by posting notice on the property and leaving a copy of the process with the occupant," it immediately made clear that the "notice" to be "posted" was the warrant of arrest *in rem* by citing and quoting Supplemental Rule E(4)(b) and the decision in *United States v. TWP 17 R 4, Certain Real Property in Maine*, 970 F.2d 984, 986 and n.4 (1st Cir. 1992). *Good*, 510 U.S. at 58. The panel in *Peyton Road* declares this very procedure unconstitutional, thus squarely conflicting with *Good*. It also creates an "intra-circuit" conflict with *United States v. $38,000.00 in United States Currency*, 816 F.2d 1538, 1545-46 (11th Cir. 1987), which holds, in accordance with other circuits, that "execution of the process" means execution of the warrant of arrest *in rem* and that, without such execution, there is neither jurisdiction nor any obligation on the part of a claimant—even a claimant with undisputed notice of the action—to make any responsive filings. *Accord United States v. Approximately Two Thousand, Five Hundred Thirty-Eight Point Eighty-Five Shares (2,538.85) of Stock Certificates of the Ponce Leones Baseball Club, Inc.*, 988 F.2d 1281 (1st Cir. 1993); *United States v. $38,570 U.S. Currency*, 950 F.2d 1108, 1113 (5th Cir. 1992).

Peyton Road is subject to challenge on other grounds as well. First, it imposes the remedy of dismissal based solely on *potential*, and even *speculative*, deprivations of property rights contrary to *Carey v. Piphus*, 435 U.S. 247, 264 (1978) ("neither the likelihood of . . . injury nor the difficulty of proving it is so great as to justify [imposing a remedy such as dismissal] without proof that such *injury actually was caused*" by the denial of procedural due process; owners entitled only to nominal damages absent such proof). Second, it follows *Peyton Woods* by imposing the illogical remedy of dismissal without prejudice. This remedy is contrary to the majority rule which holds that suppression of any evidence gained as a result of the unlawful seizure is the primary remedy for a *Good* violation. The supposed rationale for rejecting the majority rule is that suppression makes sense when the purpose of the seizure is to preserve or acquire evidence, but not when the primary purpose is simply to secure federal *in rem* jurisdiction over the property. The flaw in this reasoning is that, in cases involving the illegal arrest of a person pursuant to an

arrest warrant, the remedy is suppression of any evidence gained "incident to the arrest" and clearly not dismissal of the criminal prosecution. *See United States v. Crews,* 445 U.S. 463, 474 (1980) (citing cases). Yet such arrests, like arrests *in rem*, are undertaken primarily to subject the arrestee to the jurisdiction of the court and not to acquire or preserve evidence.

For a case upholding the constitutionality of the post and walk policy after *Good, see United States v. Real Property Located at 165 Adelle Street,* 850 F. Supp. 534 (S.D. Miss. 1994). —*HSH*

Good Violation

■ **Damages for *Good* violation include return of rents, but not reimbursement for mortgage payments and other expenses claimants would have incurred if property had never been seized.**

Several pieces of real estate and equipment were seized for purposes of forfeiture in July 1989. In November 1993, the defendant real and personal properties were ordered forfeited. In December 1993, the Supreme Court decided *United States v. James Daniel Good Real Property,* holding that, in the absence of exigent circumstances, the Fifth Amendment gives owners of real property a right to notice and opportunity for a hearing before such property may be "seized" for forfeiture.

On appeal, the Seventh Circuit affirmed the forfeiture but remanded the case for a rehearing to determine if exigent circumstances justified the seizure, and if not, to determine what, if any, damages resulted from the illegal seizure between the date of the seizure and the date of the first adversarial hearing. On remand the court determined that there were no exigent circumstances justifying the seizure. The Government and the claimant then reached a settlement under which the Government returned over $91,000 in rents that the Government had received between the seizure and hearing. The claimants, however, sought additional damages associated with the deprivation of their real and personal property. The district court rejected these claims.

It held that claimants are not entitled to damages relating to the *ex parte* seizure of their personal property, because *Good* plainly does not apply to such property. Moreover, it rejected the claims for certain payments made by the claimants during the period of the illegal seizure (*e.g.*, mortgage payments, utility bills, and real estate taxes). It reasoned that the claimants should be put in the position in which they would have been had they possessed the property during this period and noted that, if they had been operating the rental property, they would have received rental income and incurred these expenses. It concluded that, upon return of the rents pursuant to the settlement agreement, the claimants had been made whole and disallowed reimbursement of their expenses.

The court also rejected the claim for "intangible damages" resulting from loss of use and enjoyment of the property. It noted that, by renting out the properties, the claimants contracted away their right of use and enjoyment and, with the return of the rents, had now received the benefits of those contracts. The court also rejected the claim to compensation for deprivation of other rights of ownership, such as the right to alter the property, as requiring speculation as to what the claimants would have done with the property and because there would be costs attendant to such alterations which the claimants had not borne.

Finally, the court concluded that the claimants were entitled only to nominal damages in the amount of $1.00. It noted that, under *Carey v. Piphus*, 435 U.S. 247 (1978), deprivations of due process are actionable even absent actual injury but only for nominal damages. —*HSH*

United States v. All Assets and Equipment of West Side Building Corp., 1997 WL 187319 (N.D. Ill. Apr. 10, 1997) (unpublished). Contact: AUSA Rita Kelecius, AILN02(rkeleciv).

Comment: The Asset Forfeiture and Money Laundering Section views this case as correct in its rejection of the claims for damages, except for an award of nominal damages under *Carey v. Piphus*. However, we would extend *Carey v. Piphus* to the return-of-rents issue and argue that the claimants were only entitled to such rents upon proof that the outcome would have been different—*i.e.*, that they would have rebutted the existed of probable cause—had they been afforded full due process in a timely manner. This issue was, of course, moot in the context of this case because the rents were returned pursuant to the settlement agreement. —*HSH*

Ancillary Proceeding / Standing / Bankruptcy / Rule 60(b)

- **A bankrupt person lacks standing to challenge a criminal order of forfeiture; because the claimant's interests have been transferred to the bankruptcy estate, only the estate has standing to file a claim under section 853(n).**
- **Notwithstanding the relation back doctrine, property subject to forfeiture becomes part of the bankruptcy estate when its owner is declared bankrupt if the bankruptcy declaration occurs before the entry of the preliminary order of forfeiture.**
- **A third party may not challenge the legality of a defendant's guilty plea or its agreement to forfeit its property.**

Ken Mizuno conspired with a Japanese corporation, Ken International, to defraud Japanese citizens by overselling golf course memberships in a Japanese country club. The proceeds of the fraud—about $260 million—were laundered in the District of Nevada, where the corporation was indicted on money laundering charges.

Both Mizuno and the corporation were declared bankrupt in Japan, and an administrator was appointed to represent the bankruptcy estates. The administrator then agreed to enter a plea of guilty to the money laundering charges against the corporation, and agreed to the forfeiture of the corporate assets under 18 U.S.C. § 982(a)(1) and 21 U.S.C. § 853. When the order of forfeiture was entered, Mizuno filed a claim in the ancillary proceeding. The district court dismissed the claim and the Ninth Circuit, in an unpublished decision, affirmed.

First, the court affirmed the dismissal of the Mizuno claim for lack of standing. Any interest that Mizuno may have had in the forfeited property was transferred to the bankruptcy estate when Mizuno was declared bankrupt. Therefore, the estate, not Mizuno, would be the proper party to challenge the forfeiture.

Mizuno argued that some of the forfeited property never became part of the bankruptcy estate because, under the relation back doctrine, the Government's forfeiture interest took effect before Mizuno was declared bankrupt. Thus, Mizuno insisted, he had standing to contest the forfeiture of at least some of the property. But the Court of Appeals disagreed. Relying on the Supreme Court's decision in *United States v. 92 Buena Vista*, 507 U.S. 111, 124 (1993), in which the Court interpreted the civil version of the relation-back doctrine, the Court of Appeals held that the Government's forfeiture interest does not take effect until a preliminary order of forfeiture is entered. Because that event did not occur until after Mizuno was declared bankrupt, all of his property, including any part subject to the forfeiture order, became part of the bankruptcy estate.

Next, Mizuno argued that the corporation's guilty plea and agreement to forfeit of its property was defective because the district court failed to establish a factual basis for the forfeiture under Fed. R. Crim. P. 11(f). The court held, however, that under *Libretti v. United States*, 116 S. Ct. 356, 364-65 (1995), the district court "was under no obligation to make such an inquiry." Moreover, Mizuno, as a third party, was barred by 21 U.S.C. § 853(k) from challenging the corporation's guilty plea on any ground other than those set forth in section 853(n).

Finally, Mizuno moved under Fed. R. Crim. P. 33, for a new trial or "relief" from the district court's judgment dismissing his claim. The district court denied this motion and Mizuno appealed. But the Court of Appeals held first, that the motion was more properly considered a motion under *Fed. R. Civ. P. 60(b)*, since ancillary proceedings are civil in nature, not criminal; and second, that an appellate court lacks jurisdiction to review a denial of a Rule 60(b) motion where an appeal from the underlying matter has been taken. —*SDC*

United States v. Ken International Co., Ltd., 1997 WL 229114 (9th Cir. May 2, 1997) (unpublished). Contact: AUSA Dan Hollingsworth, ANV01(dholling).

Standing / Suppression / Summary Judgment

- **If, under state law, a claimant has no ownership interest in his spouse's property, the claimant lacks standing to contest the forfeiture of that property.**
- **Mere ownership of the premises from which property is seized is not sufficient to establish standing to contest the property's forfeiture.**
- **Statements made to the police at the time of an illegal search or seizure must be suppressed as fruits of the Fourth Amendment violation, but statements subsequently made in discovery in a civil forfeiture case are sufficiently attenuated by time and the presence of counsel to purge the taint, and are therefore admissible.**

After observing and photographing marijuana growing on claimants' real property during an overflight, state police conducted a search of the property without obtaining a warrant. During the warrantless search, the police found marijuana plants, dried marijuana, drying fans, plant food, grow lights, marijuana seeds, firearms, ammunition, gold and silver coins, and $1,336 in cash. The United States filed complaints for civil forfeiture of the gold and silver coins and the cash pursuant to 21 U.S.C. § 881(a)(6) and the real property pursuant to 21 U.S.C. § 881(a)(7).

Claimants, a husband and wife, filed an joint claim contesting the forfeiture of the real property, the coins and the cash. After discovery proceedings and several stays pending the outcome of the state prosecution (which excluded evidence derived from the search), the Government moved for a summary judgment of forfeiture which the court granted in part and denied in part.

The court first ruled that the husband lacked standing to claim the coins as "marital property" once he acknowledged that they belonged to his wife. The court found that the state law relied on by the husband to establish his standing to contest forfeiture of the coins did not create property interests of one spouse in the property of the other during the marriage. For the same reason, the court found that the wife lacked standing to claim the husband's cash as marital property. The wife argued that an additional basis for her standing was that she owned the premises from which the cash was seized, but the court ruled that mere ownership of the premises from which property is seized does not give the owner standing to contest the forfeiture of the seized property. Consequently, the court dismissed the husband's claim to the coins and the wife's claim to the cash.

The court next considered what evidence would have to be suppressed if it found that the warrantless search of the property was illegal. It ruled that all of the physical evidence seized from the real property, and all of police testimony about that evidence, would be excluded as direct products of the warrantless search. The same was true for statements made by the claimants at the time of the seizure, but whether any of the claimants' subsequent statements made before and during the state prosecution and in the course of discovery in the civil forfeiture action had to be suppressed presented a closer question.

The question was "whether the taint of an unlawful search or arrest has sufficiently dissipated so as to no longer taint a subsequently acquired statement." Where the connection between the taint of official misconduct and a statement is attenuated, the Seventh Circuit applies the factors from *Brown v. Illinois*, 422 U.S. 590 (1975) to determine when official misconduct taints the later statements: the voluntariness of the statement; the temporal proximity of the statement to the official misconduct; the

presence of intervening circumstances; and the purpose and flagrancy of the official misconduct. *United States v. Fazio*, 914 F.2d 950, 957 (7th Cir. 1990).

Applying these factors, the court found that unlike claimants' written and oral statements to the police on the day of the search, subsequent statements made with assistance of counsel in response to interrogatories and in deposition testimony during discovery in the forfeiture case nearly four years after the search were sufficiently purged of taint to permit the court to consider them in determining whether the Government met its burden of establishing probable cause for a summary judgment of forfeiture.

On the merits of the motion for summary judgment, the court held that the flyover observation and photographs of what appeared to be marijuana plants growing on the property and the claimants' deposition statements that the husband had a drug problem, grew marijuana for his personal use, and smoked marijuana on the property amply established probable cause for the forfeiture of the real property. Thus, the court granted the Government's motion for summary judgment regarding the real property.

However, the court ruled that the presence of factual issues required denial of summary judgment as to the coins and cash even if admissible evidence might establish probable cause that they were proceeds of or intended to be used for a drug transaction. The wife's deposition testimony, corroborated by her brother's deposition testimony, was that the coins were a gift to them from their father and that they had been given to them in the same waterproof package in which the police found them. As to the cash, the husband's deposition testimony was that the money was from his legitimate employment with local government. —*JHP*

United States v. 47 West 644 Route 38, ___ F. Supp. ___, 1997 WL 208373 (N.D. Ill. Apr. 25, 1997). Contact: AUSA Ernest Ling, AILN02(eling).

Comment: As a footnote to history, we note that this case was one of those relied upon by Representative Henry Hyde in 1996 hearings on asset forfeiture reform to illustrate the "abuses" of property owners' rights in forfeiture cases. —*SDC*

Standing / Traceable Property / Substantial Connection / Real Property

- **Claimant who agrees to civil forfeiture of property as part of a plea agreement has no standing to contest forfeiture of that property in a civil forfeiture proceeding.**
- **Claimant who takes title to property subsequent to filing of lis pendens by the Government has ownership interest sufficient to establish standing to contest civil forfeiture of that property.**
- **Insurance proceeds from fire which destroyed forfeitable property are forfeitable as property traceable to forfeitable property.**
- **Substantial connection may be shown by means not directly related to the actual drug transactions, such as ability of drug trafficker to conceal his actions by virtue of the location of the property.**
- **Entire farm, which always operated as one tract, was forfeitable despite separate deeds.**

Defendant was indicted on various drug charges. As part of his plea agreement, he agreed to the civil forfeiture of an eleven-acre farm comprising several parcels of land. When the Government filed a civil forfeiture action against the farm, the defendant and his four siblings, who lived on the various contiguous parcels which made up the farm, filed claims. The Government moved for summary judgment.

The farm originally belonged to the defendant's mother who divided the farm into separate parcels for estate planning purposes. The farm was always operated as a single tract, however, and at the time the defendant was arrested, he was the sole owner of each parcel. The Government filed a *lis pendens* as to the farm. Two years after the plea agreement was signed, the defendant deeded all but one of the parcels to his other siblings, retaining title only to a single parcel containing his residence. That residence was destroyed by fire after the plea agreement was signed.

The Government sought to forfeit the insurance proceeds obtained by defendant as a result of the fire as property traceable to forfeitable property. It also sought the forfeit the parcels deeded by the defendant to his siblings. All claimants agreed that the parcel containing the defendant's residence was used for his drug operations; and none of the claimants asserted that they were unaware of the defendant's drug activities.

First, the court determined that the defendant had no standing to contest the civil forfeiture of the farm because he contracted away his legal right to contest the forfeiture when he entered into the plea agreement. The court held, however, that even though his siblings took title to the parcels subject to the *lis pendens*, they had ownership interests in the parcels sufficient to contest the forfeiture.

Next, the court held that because the parcel containing defendant's residence was forfeitable, any insurance proceeds stemming from the fire which destroyed that residence would also be forfeitable.

The main issue was whether the various parcels constituted a contiguous tract that was substantially connected to the defendant's drug activity, or whether only one of the parcels was so connected. The Government contended that the whole farm facilitated defendant's drug activities because it provided a cover for the drug trafficking. The court agreed.

"Substantial connection may be shown by means not directly related to the actual drug transaction, such as the ability of the drug trafficker to conceal his actions by virtue of the location of the property, etc." Specifically, the court, relying upon *United States v. Two Tracts of Real Property with Blds*, 998 F.2d 204 (4th Cir. 1993), found that the Government demonstrated that the farm operated as one tract of land and that the location of the property provided a "clandestine" backdrop to the defendant's drug trafficking activities. Thus, the court granted summary judgment in favor of the Government. —*DAB*

United States v. Real Property Described in Deeds, ___ F. Supp. ___, 1997 WL 222289 (W.D.N.C. Feb. 20, 1997). Contact: AUSA B. Frederick Williams, ANCW01(fwilliams).

Rule 41(e) / Amendment of Complaint

- **While Government must have probable cause when it effects a warrantless seizure, it need not demonstrate that probable cause until trial.**
- **Rule 41(e) is not an available remedy where a claimant has an adequate opportunity to contest the seizure of the property in a civil forfeiture proceeding.**
- **The Government may amend a section 881 forfeiture complaint to include a money laundering theory; it is not required to announce a theory of probable cause when a warrantless seizure occurs, and it need not be irrevocably held to the probable cause theory of the original complaint.**

Claimant purchased a one-way ticket to New York from Dallas, and was carrying a single suitcase. Upon a request by Drug Enforcement Administration (DEA) agents, claimant allowed a search of the bag, where the agents found $146,800 in currency wrapped in newspaper and manilla envelopes. He then made contradictory statements about the currency, and admitted that he was to pick up an additional $300,000 in New York to be deposited in numerous banks in increments under $10,000. Claimant also said that he understood that the person who had provided him the money bought and sold U.S. currency on a black market in Venezuela. DEA seized the currency.

Six months later, the Government filed a forfeiture action for the currency under 21 U.S.C. § 881. In response, the claimant filed a claim and a summary judgment motion. The Government then sought to amend its action to add a claim based upon a money laundering forfeiture theory. Claimant responded with a motion for return of property.

The court first addressed the summary judgment motion, which asserted that the Government lacked probable cause when it seized the currency. The court said that absence of probable cause at the time of seizure may result in the later suppression of evidence, but that seized property may not be suppressed in a forfeiture proceeding. Further, while the Government must have probable cause when effecting a warrantless seizure, the court said that it need not demonstrate that probable cause until trial. Even property that is found to have been seized illegally may still be the valid subject of forfeiture.

The court next focused on the motion for return of property. Claimant alleged that the property should be returned because it was seized without probable cause, but the court found that a Rule 41(e) motion was not the correct vehicle for challenging the seizure

of the property. Courts should refrain from granting relief under Rule 41(e) and its civil equitable equivalents if a claimant has an adequate remedy at law. Because the claimant had an adequate opportunity to contest the seizure of the property in the civil forfeiture proceeding, the court declined to exercise equitable jurisdiction over a motion for return of property.

The court also addressed claimant's request for an "emergency" probable cause hearing, finding that a claimant may be entitled to a post-seizure hearing if the Government's delay in filing a civil forfeiture is so lengthy as to violate due process. Relying on the test from *Barker v. Wingo*, 407 U.S. 514 (1972), the court found no prejudice to claimant from a six-month delay, nor did the court find the delay *per se* unreasonable.

Finally, the court granted the Government's motion to amend the complaint to include a money laundering theory. Claimant asserted that he would be prejudiced by the amendment, but the court found that claimant failed to show any true prejudice, since the facts supporting the proposed claim were identical to those already pled and since the proposed claim was closely related to the original complaint. Claimant argued that he was prejudiced because the Government selected its remedy when it seized the property, but the court held that the Government need not select a theory of probable cause when a warrantless seizure occurs. The court also rejected the view that the Government must be held to the probable cause theory asserted in an original complaint. This was especially appropriate since the Government had not "disavowed" the money laundering theory in any submissions to the court.

—GAP

United States v. $146,800, 96-CV-4882 (E.D.N.Y. Apr. 28, 1997) (unpublished). Contact: AUSA Tracey Salmon Smith, ANYE03(tsalmon).

Warrantless Seizures / Probable Cause

- **Seizure of property is valid when incident to a search warrant and when there is probable cause to believe that the property is subject to forfeiture.**

Police officers executed a search warrant of the defendant's home searching for illegal narcotics, paraphernalia and other evidence of narcotics trafficking. During the search, however, several items not listed in the warrant were seized, namely a washer and dryer, two big screen television sets, a riding lawn mower, a four wheel Suzuki Quad Runner, and two video cameras and tripods. The defendant moved to suppress this evidence as being beyond the scope of the search warrant.

At the suppression hearing, one of the officers testified that the items were seized because there was probable cause to believe that the items constituted proceeds of drug activity under 21 U.S.C. § 881(a)(6). At the time of the search, the officers knew that: (1) the defendant had been unemployed for years; (2) the defendant was found to have large sums of cash on his person on several occasions; (3) the defendant purchased a home and several vehicles while unemployed; and (4) the officers discovered drugs and drug paraphernalia in the defendant's residence.

Noting that seizures of property under section 881 must still comply with the requirements of the Fourth Amendment, the district court found that the evidence did establish probable cause that the items were subject to forfeiture. Consequently, the court ruled that the warrantless seizures were valid under 21 U.S.C. § 881(b)(1).

—MDR

United States v. Washington, 1997 WL 198046 (D. Kan. Jan. 17, 1997) (unpublished). Contact: AUSA David Lind, AKS01(dlind).

Plea Agreements

■ **Defendant breached his plea agreement when he promised to aid the Government in identifying and recovering his assets but then proceeded to incur new debts and liabilities.**

Defendant was an insurance agent who diverted funds received from clients for the purchase of lump-sum annuities into his personal checking account. From this account, he made false "interest" payments to lull his clients into believing that their funds had been properly invested.

Defendant pleaded guilty to nine counts of mail fraud and three counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i). His plea agreement required him to be "fully truthful and forthright" in aiding the Government in identifying and recovering assets in return for which the Government agreed to make a recommendation that defendant receive a three-level downward adjustment for acceptance of responsibility. During the 75 days between the plea and sentencing, however, the defendant increased his credit card debt by almost $48,000, paying off creditors unrelated to his fraud. The Government argued against an acceptance of responsibility departure on grounds that defendant had failed to make all of his assets available for restitution. The district court refused to grant the downward departure. On appeal, the defendant argued that the Government breached the plea agreement.

A unanimous panel held that defendant breached the plea agreement and thereby released the Government of its commitment to recommend the "acceptance of responsibility" departure. It noted that the defendant understood his obligation as indicated by the transcript of the plea hearing and that the district court had advised him that he was being released on bond only to help the victims of the fraud to recover their losses. The defendant instead increased his liabilities by paying off creditors unrelated to his fraud. —*HSH*

United States v. Walker, 112 F.3d 163 (4th Cir. Apr. 25, 1997). Contact: AUSA John M. Barton, ASC01(jbarton).

Comment: *Walker* is not a forfeiture case; the defendant's commitment to assist in the identification and recovery of assets related to his obligation to make restitution. However, the case may be usefully applied in cases involving plea agreements in which the defendant agrees to assist in the identification and recovery of assets for purposes of civil or criminal forfeiture. Such plea agreements should always commit the defendant to be "truthful and forthright" in rendering such assistance. If the defendant fails to satisfy this obligation, *Walker* stands as authority for the Government to deny him or her the benefit of the bargain. —*HSH*

Personal Jurisdiction

- **Federal Rules of Civil Procedure apply in civil forfeiture actions as long as they are not inconsistent with the Supplemental Rules.**

The United States filed a civil forfeiture action pursuant to 18 U.S.C. § 981 against certain funds which were proceeds of an unauthorized wire transfer. The cross-claim defendants filed answers to the cross-claim but did not raise a personal jurisdiction defense. Subsequently, defendant amended her answer to include such a defense. Claimants filed objections that they waived any personal jurisdiction defense because they failed to raise it in their answers to the Government's complaint.

The court stated that a party must raise the defense of lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12 in its first motion or responsive pleading, otherwise the objection is waived. The Federal Rules of Civil Procedure apply in civil forfeiture actions as long as they are not inconsistent with the Supplemental Rules. Because the Supplemental Rules do not specify when certain defenses must be raised or waived, the Federal Rules prevail. Relying on *United States v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 971 F.2d 974 (3d Cir. 1992), the court held that when a claimant files its claim of ownership to the *res* that is the subject of the forfeiture proceeding without objecting to the court's *in personam* jurisdiction, the claimant waives any jurisdictional defense and the court may exercise jurisdiction over the claimant.

—*MML*

United States v. All Right . . . in the Contents of . . . Accounts at Morgan Guaranty Trust Co., 1997 WL 220309 (S.D.N.Y. May 1, 1997) (unpublished), *aff'g in part, modifying in part* Magistrate's Recommendation, 1996 WL 695671 (S.D.N.Y. 1996). Contact: AUSA Gary Stein, ANYS02(gstein).

Discovery

- **Claimant cannot refuse to respond to discovery requests based on the defense that he is in prison and cannot produce documents; nor can he rely on the self-incrimination privilege when he has pleaded guilty to the underlying drug offense.**

Claimant initially pleaded guilty to narcotics charges. The United States thereafter filed a forfeiture complaint against seven pieces of jewelry, alleging that the jewelry constituted drug proceeds. Claimant filed a claim alleging that he owned the jewelry and did not purchase the items with illegally derived proceeds. The United States then filed a set of interrogatories and requests to produce, seeking general information concerning claimant's income during the period in which he purchased the jewelry. When claimant did not respond, the United States notified him that it would file a motion to dismiss for failure to produce discovery.

After two months with no response by claimant, the United States filed a motion to strike the claim. The magistrate judge issued an Order to Show Cause why the claim should not be dismissed for failure to respond to discovery requests. When claimant still

did not respond, the magistrate recommended that the claim be dismissed.

When claimant belatedly filed a response, alleging that the Court's prior orders were sent to an incorrect address, the court entered an order directing claimant to respond to the Government's discovery requests and the Magistrate's Order to Show Cause within ten days. Although claimant still did not respond to the discovery requests, he did respond to the show cause order. Claimant argued that he could not provide the Government with his tax records because he is in prison, and that responding to the Government's discovery requests would violate his Fifth Amendment privilege against self-incrimination.

The court was not persuaded. It held that while it may be difficult for claimant to produce documents while in prison, it did not excuse him from answering the Government's interrogatories. Many of the interrogatories concerned general aspects of claimant's prior employment to which he could respond from memory. The court also held that claimant was simply wrong in arguing that the Fifth Amendment entitled him to maintain his claim while refusing to answer the Government's discovery requests. Because claimant pleaded guilty to the underlying drug offenses, he was not at risk to incriminate himself and the privilege provided him no protection against answering the Government's interrogatories.

The court gave claimant an additional ten days to respond to the discovery requests and if there was no response, the court would strike his claim and enter a judgment of forfeiture in favor of the United States.

—MML

United States v. Seven Pieces of Assorted Jewelry, No. 96-6628-Civ-Ryskamp (S.D. Fla. Apr. 10, 1997) (unpublished). Contact: AUSA William H. Beckerleg, AFLS01(wbeckerl).

Administrative Forfeiture / Notice

- **Whether the Drug Enforcement Administration (DEA) acted reasonably in attempting to give claimant notice of an administrative forfeiture should be determined from the agency's perspective at the time notice is sent.**
- **DEA's failure to anticipate that someone would forge the claimant's name on the certified mail receipts did not render notice defective; service must be "reasonably certain" to inform interested parties of pending forfeiture, but need not eliminate all risk of nonreceipt.**

Pro se plaintiff sought return of $11,960 seized by DEA. DEA arrested the plaintiff for cocaine possession, and seized the currency from him at the time of his arrest. DEA sought forfeiture of the currency, and published notice of the intended forfeiture in a local newspaper. DEA also sent two notices of seizure to addresses thought to belong to plaintiff. Both notices were returned, stamped "Return to Sender—Unknown." After discovering that the notices had been incorrectly addressed, DEA sent two additional notices, by certified mail, to two new addresses for plaintiff. The certified mail receipts were returned, signed with plaintiff's name, but DEA received no claim and forfeited the money administratively.

Plaintiff subsequently filed a petition for release and return of the property, claiming that someone forged his signature on the mail receipts. He said he

did not receive the notice because he was in prison on unrelated charges at the time.

The court analyzed whether DEA had provided notice reasonably calculated, under all the circumstances, to apprise interested parties of the pending action and afford them an opportunity to present their objections. The court made its analysis from the perspective of DEA at the time the notice was sent. Moreover, while the service must be "reasonably certain" to inform interested parties, it need not mean that "all risk of nonreceipt must be eliminated." The court also said that courts have read an implied bad faith standard into the notice inquiry, so that even if formal procedures are followed, the notice will be rejected if the party knew or had reason to know that notice would be ineffective.

Here, the court found that DEA had every reason to believe that its notice had reached the proper party. DEA had received two return receipts signed with plaintiff's name. While the risk existed that someone had forged plaintiff's signature (as plaintiff alleged), the risk was slight and did not render the notice constitutionally infirm. The administrative forfeiture thus conformed with due process. —*GAP*

Owens v. United States, 1997 WL 177863 (E.D.N.Y. Apr. 3, 1997) (unpublished). Contact: AUSA Vincent Lipari, ANYE03(vlipari).

Notice / Innocent Owner Defense / Relation Back Doctrine / EAJA Fees

- **Government must notify town of forfeiture action involving real property in which town has perfected tax lien.**
- **Town that has perfected tax lien in real property, is an "innocent owner" pursuant to 21 U.S.C. § 881(a)(7).**
- **Since town was "innocent owner," relation back doctrine does not prevent it from recovering amount of back taxes due pursuant to its perfected tax lien.**
- **Because Government was not justified in failing to notify town of forfeiture action and in failing to pay town back taxes owned on forfeited property, town would be entitled to EAJA fees but for absence of subject matter jurisdiction.**

In September 1994, certain real property was forfeited to the United States, pursuant to 21 U.S.C. § 881(a)(7), as a result of illegal drug transactions occurring in 1991-92. At the time of forfeiture, back property taxes were owed to the town of Sanford, Maine. Under Maine law, if a town has assessed taxes, a perfected tax lien automatically arises against the affected property. Therefore, as of April 1, 1994—the date the taxes were assessed—Sanford had an ownership interest in the real property, *i.e.*, a perfected lien, for the taxes assessed for that year.

When the United States commenced its forfeiture proceeding, it gave no notice to Sanford. Subsequently, in late 1995, Sanford learned of the proceeding and requested that the Government pay the 1994 taxes, but the Government declined. Sanford then sued, asserting jurisdiction under the Administrative Procedure Act (APA), 5 U.S.C. § 702, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Sanford sought declarations that

its tax lien was valid and that the Government was obliged to give notice of the forfeiture proceedings to the town so its tax claims could have been asserted before the forfeiture decree was entered. Sanford also sought recovery of the 1994 taxes as well as fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412.

The court held that Sanford qualified as an "innocent owner" of an interest in the property, and was entitled to receive the back taxes as a condition of giving up its perfected lien. (The court noted that, because Sanford's interest in the property predated the forfeiture, this case did not raise the issue of a municipality impermissibly taxing the Federal Government.) Although the illegal acts upon which the forfeiture was based occurred prior to Sanford's acquiring an interest in the property, the court held that the "innocent owner defense" prevented the "relation back" doctrine from defeating Sanford's interest in the property. The court held that the Government should have given Sanford notice of the forfeiture proceeding and should have paid the 1994 taxes. Moreover, these principles should have been sufficiently clear that, in a "proper case," an award of EAJA fees would have been justified.

However, the court held that this was not a "proper case," and granted summary judgment for the Government based upon lack of subject matter jurisdiction. The court found that the Government's failure to give Sanford notice of the forfeiture proceeding did not constitute final agency action subject to judicial review under the APA. Nor was there jurisdiction pursuant to the Declaratory Judgment Act. This act is procedural only. An independent ground of federal jurisdiction must exist before declaratory relief can be requested, and none existed here. *—MSB*

Town of Sanford v. United States, ___ F. Supp. ___, 1997 WL 205825 (D. Me. Apr. 8, 1997).
Contact: AUSA Jonathan A. Toof, AME01(jtoof).

Rule 41(e) / Administrative Forfeiture / Subject Matter Jurisdiction

- **Procedurally sound administrative forfeiture deprives court of subject matter jurisdiction for review.**
- **Drug Enforcement Administration's (DEA'S) failure to mail acknowledgment of receipt of plaintiff's petition for reconsideration of his petition for remission to the correct address was not a procedural deficiency in the administrative forfeiture.**

Plaintiff, a convicted heroin trafficker, moved pursuant to Fed. R. Crim. P. 41(e) for return of $1,000 that theDEA seized from him at the time of his arrest smuggling the heroin into the United States. DEA published notice of the administrative forfeiture proceeding and sent notice by certified mail to the plaintiff in prison and by registered mail to plaintiff's address overseas. The plaintiff filed no claim and cost bond. Instead, plaintiff sent a letter to DEA requesting mitigation of the seizure. DEA construed this letter as a petition for remission or mitigation of forfeiture, administratively forfeited the seized money, and proceeded to consider, and ultimately to deny, plaintiff's petition. DEA notified plaintiff by letter of the denial of his petition and of the procedures for seeking reconsideration of the denial. Several weeks later, DEA received, acknowledged, and denied plaintiff's request for reconsideration.

The court pointed out that if the potential claimant chooses not to file a timely claim and cost bond, as happened in this case, administrative forfeiture occurs by default, and that once the administrative forfeiture process has been completed, the court only has jurisdiction to review the administrative forfeiture for constitutional or procedural irregularities. *See United States v. One Jeep Wrangler*, 971 F.2d. 472, 480 (2d Cir. 1992); *Onwubiko v. United States*, 969 F.2d 1392, 1398 (2d Cir. 1992). The only procedural irregularity alleged in this case was that DEA's acknowledgment of the receipt of plaintiff's request for reconsideration was sent to the wrong prison. The court ruled, however, that the letter acknowledging receipt of the request for reconsideration of the denial of the petition for remission had no effect on plaintiff's substantive rights in contesting the forfeiture. Consequently, DEA's failure to send it to the correct prison did not constitute a procedural deficiency or irregularity.

The court concluded that DEA had followed the proper procedures for administratively forfeiting the seized $1,000, and that, because the forfeiture proceeding was procedurally sufficient, there was no jurisdiction to hear plaintiff's claim for return of the currency. —*JHP*

Ademoye v. United States, 1997 WL 218212 (E.D.N.Y. April 11, 1997) (unpublished). Contact: AUSA Jennifer C. Boal, ANYE03(jboal).

Marital Privilege / Post-conviction Discovery

- **Defendant's wife may not assert a marital privilege when served with a deposition subpoena intended to locate the defendant's criminally forfeited assets.**

Defendant pled guilty to various RICO counts and agreed to forfeit a total of $916,000. When defendant was required to disclose his assets, he disclosed $5,000 worth of jewelry, and referred all questions about his family finances to his wife.

The Government obtained a discovery order pursuant to 18 U.S.C. § 1963(k) and commenced a deposition of defendant's wife as part of an effort to locate defendant's assets. Throughout the deposition, defendant's wife asserted a privilege against testifying adversely to her spouse's interests. The Government moved to compel her testimony, and after a hearing before a magistrate judge, the motion was granted. The wife filed objections to the report and recommendation of the magistrate judge, but the district court affirmed and adopted the magistrate judge's order.

The district court agreed that where one spouse is a party to a proceeding and the other spouse is called to testify, the adverse spousal testimony privilege is generally applicable. But, the court said, it is not required to enforce the privilege in circumstances where it would clearly contravene the intent of Congress. In particular, in a criminal forfeiture case where the Government is seeking to discover the location of defendant's assets, recognizing his wife's right to invoke an adverse spousal privilege would contravene Congress' mandate to preserve the Government's ability to reach those assets.

The court also rejected the wife's argument that her husband might be prosecuted in the future based upon her testimony. This concern was too speculative, the court said, noting that the defendant was already convicted and sentenced for crimes involving the assets sought to be discovered. Thus, the Government's motion to compel the wife's testimony was granted.

The district court sustained the wife's objection to the deposition, however, to the extent that it sought information regarding the wife's own assets. Because

criminal forfeiture is limited to the defendant's assets, the Government had no grounds to take discovery under section 1963(k) regarding the wife's assets. —*MLC*

United States v. Yerardi, Crim. No. 93-10278 (REK) (D. Mass. May 5, 1997) (unpublished). Contact: AUSA Richard L. Hoffman, AMA01(rhoffman).

Excessive Fines / Bona Fide Purchaser

- **District court finds criminal forfeiture of defendant's 160-acre ranch containing his house (and a methamphetamine lab) to be excessive; reduces forfeiture to 30 percent of the ranch's value.**

- **Criminal defense lawyer who, on the day the indictment was returned, took as security for his fee a $100,000 deed of trust on property named in the indictment for forfeiture, was not a bona bide purchaser.**

Defendant was convicted of crimes growing out of his operation of a methamphetamine lab on the 160-acre ranch where he lived with his family. Initially, after the ranch was ordered forfeited under 21 U.S.C. § 853, the court held that forfeiture of the entire ranch was not an excessive fine under the Eighth Amendment, because: (1) the entire ranch was used to conceal the lab; (2) the ranch was conveyed to Defendant under a single deed and was nonseverable; and (3) Defendant had not shown the forfeiture to be grossly disproportionate under the criteria mandated by *United States v. Real Property in Located El Dorado County*, 59 F.3d 974 (9th Cir. 1995). However, Defendant's equity appeared to be only $83,000 because there were a number of large liens on the property.

Defendant did not pay his attorney, but gave him a $10,000 deed of trust in the ranch. When the attorney filed an ancillary petition for allowance of the deed of trust, the United States opposed it on the ground that because it had been executed on the date the indictment was returned, the attorney was not at the time of execution "reasonably without cause to believe that the property was subject to forfeiture...." 21 U.S.C. § 853(n)(6)(B). The court agreed and disallowed the attorney's petition as well as all the other lienholder petitions.

Those disallowances, however, enlarged Defendant's equity, making it equal to the market value of the property—$665,000. For that reason, the court revisited the excessive fines issue, finding that the harshness of the forfeiture had been vastly increased by the increased equity, and that the value of the property, compared with the less than $33,000 in drugs Defendant had sold, required a finding of disproportionality. However, the district court was still faced with the Ninth Circuit rule that realty, such as in this case, is not severable in a forfeiture case. Therefore, it ordered 30 percent of the property forfeited, and directed the parties to file briefs suggesting how this might be accomplished. —*BB*

United States v. Toyfoya, No. CR-93-0505 EFL (N.D. Cal. Mar. 27, 1997) (unpublished). Contact: AUSA Robert Ward, ACAN01(bward).

Quick Notes

■ Ancillary Proceeding

If the defendant's conviction is reversed, and the order forfeiting the defendant's property is therefore vacated, any third-party petition filed in the ancillary proceeding is moot and will be dismissed.

United States v. Rutgard, 1997 WL 174102 (9th Cir. Apr. 9, 1997) (unpublished). Contact: AUSA John Houston, ACAS01(jhouston).

■ Excessive Fines

On May 27, 1997, the Supreme Court granted certiorari to decide whether it is per se unconstitutional, as the Ninth Circuit has held, to forfeit currency that is about to be shipped out of the country, where the forfeiture is based on the owner's failure to file the required currency report. Briefing will occur over the summer, and arguments will take place in the October 1997 Term.

United States v. Bajakajian, No. 96-1487, ___ S. Ct. ___, 1997 WL 134399 (May 27, 1997) (granting certiorari). Contact: Assistant Chief Harry S. Harbin, AFMLS, Criminal Division, CRM07(harbin).

Legislation Update: On May 22, 1997, Representative Charles E. Schumer (D- N.Y.) introduced the Forfeiture Act of 1997, a bill drafted by the Department of Justice that would make comprehensive changes and enhancements to the asset forfeiture laws. The bill number is H.R. 1745. Copies are available on the Asset Forfeiture Bulletin Board, from the Asset Forfeiture and Money Laundering Section, or on the Library of Congress' Internet homepage (*http://thomas.loc.gov/*).

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Chief ..... *Gerald E. McDowell*
Deputy Chief and Senior Counsel to the Chief ..... *G. Allen Carver, Jr.*
Assistant Chief ..... *Stefan D. Cassella*
Editor ..... *Denise A. Mahalek*
Design ..... *Denise A. Mahalek*
Index ..... *Todd Blanche*
Production ..... *Todd Blanche*

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